

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION**

WASHINGTON COUNTY, NORTH
CAROLINA and BEAUFORT COUNTY,
NORTH CAROLINA,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE
NAVY; GORDON R. ENGLAND, in his
official capacity as Secretary of the Navy, and
WAYNE ARNY, in his official
capacity as Assistant Secretary of the Navy for
Installations and Environment (Acting),
Defendants.

Civil No. 2:04-CV-3-BO(2)

THE NATIONAL AUDUBON SOCIETY,
NORTH CAROLINA WILDLIFE
FEDERATION, and DEFENDERS OF
WILDLIFE,

Plaintiffs,

v.

DEPARTMENT OF THE NAVY; GORDON
R. ENGLAND, Secretary of the Navy;
WAYNE ARNY, Assistant
Secretary of the Navy for Installations and
Environment (Acting); C.S. PATTON,
Brigadier General, U.S. Marine Corps,
Commanding General, Marine Corps Air
Station, Cherry Point,

Defendants.

Civil No. 2:04-CV-2-BO(2)

**UNITED STATES' REPLY IN SUPPORT OF UNITED STATES'
MOTION FOR SUMMARY JUDGMENT**

Defendants, the United States Navy, *et al.*, hereby file this Reply to the Plaintiffs' Response ("Plaintiffs' Resp.") to the United States' Motion for Summary Judgment ("United States' Mtn. for S.J.").

I. Introduction

Plaintiffs' Response raises several arguments that distort the record and the reasoning behind the United States' Mtn. for S.J. As shown below, Plaintiffs' creative attempts to mischaracterize the United States' position cannot overcome the United States' Mtn. for S.J., which is based on a well-settled body of precedent governing the relevant legal issues and underlying facts.

As they did in previous filings, Plaintiffs in their Response continue to argue that the Navy's NEPA process was influenced by improper political motivations and pre-ordained decision-making solely based on a very few selected and isolated e-mail exchanges taken out of context. Plaintiffs continue to selectively quote from the Administrative Record ("AR") in a distorted version of the facts that, to borrow from Plaintiffs' Response, is "divorced from reality." Plaintiffs Resp. at 2. Further, although Plaintiffs brought this action pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* ("APA"), they continue to attempt to improperly supplement the AR by presenting extra-record material to the Court.¹

II. Argument

The United States should be granted summary judgment on all of Plaintiffs' claims, which have been brought pursuant to the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.* ("NEPA"), the Coastal Zone Management Act ("CZMA"), 16 U.S. C. §§ 1451, *et seq.*, and the APA. Incredibly, Plaintiffs assert that a thirty-nine month environmental review, an extensive Final Environmental Impact Statement ("FEIS") and an over 194,000 page AR are merely "a 'greenwash' of NEPA's requirements." Plaintiffs' Resp. at 3. To the contrary, the

^{1/} Plaintiffs have moved this Court to supplement both of the AR's in these consolidated cases with dozens of miscellaneous documents over the course of this litigation. Some of those documents post-date the decisions being challenged, and are entirely beyond the scope of the AR. *See e.g.*, Plaintiffs' two Motions to Supplement dated November 22, 2004. In fact, as recently as December 20, 2004, in conjunction with their Response briefs, Plaintiffs again moved this Court to supplement the AR, this time with documents pertaining only to the MOA AR. The United States maintains that all of these efforts are inappropriate and should be denied.

record before this Court demonstrates that the Navy performed an exhaustive review of all of the environmental impacts associated with the construction of an OLF, in full compliance with the letter and spirit of NEPA. Plaintiffs contend that prior to April 2003, the “principal reason” the Navy chose to develop an OLF was to mitigate noise impacts in the Virginia Beach/Chesapeake, VA area. Plaintiffs’ Resp. at 4. However, this simply is not the case. As the United States has stated previously, the Navy recognized early on that the Super Hornets potentially would require significant support infrastructure such as an OLF. AR 011546. While identifying home basing alternatives, the Navy determined that an OLF and/or parallel runway would be required if four or more of the squadrons were stationed at MCAS Cherry Point or MCAS Beaufort. Draft EIS (“DEIS”) pp. 2-50 and 2-54; FEIS p. 2-60. Thus, this need for an OLF to support the home basing alternatives was identified early on in the EIS process. AR 010863 to AR 010870; AR 011551 to AR 011564. Moreover, with respect to the basing alternative that was eventually chosen, noise mitigation was only one of the reasons a new OLF was needed even at the time the DEIS was published; the other reason identified at that time being operational flexibility. DEIS p. 2-42.

Plaintiffs also continue their unsupported and specious argument that the Navy’s decision to locate the OLF at Site C was the product of “reverse engineering.” Plaintiffs’ Resp. at 7. A member of the Navy’s EIS Tiger Team used this phrase one time, in a single e-mail, in a completely different context, yet Plaintiffs have latched onto it as their central argument. The Court should decline to adopt Plaintiffs’ distorted view of the AR. Instead, once the Court makes its own “searching and careful inquiry” into all the facts contained in the AR, (Hodges v. Abraham, 300 F.3d 432, 445 (4th Cir. 2002)), it will find that the Navy fully complied with NEPA and thus should grant summary judgment in favor of the United States.²

^{2/} The United States has not suggested, as Plaintiffs’ imply, that the Court should “rubber-stamp” (Plaintiffs’ Resp. at 6) or “automatically defer” to (Plaintiffs’ Resp. at 8) the Navy’s assertion that it complied with NEPA.

A. Plaintiffs' Response Does Not Establish that the Navy Failed to Consider a Reasonable Range of Alternatives or "Reverse Engineered" to Select Site C

The Plaintiffs claim the Navy's alternative analysis was neither rigorous nor objective. This claim is unsustainable because Plaintiffs have failed to demonstrate to the Court how the range of alternatives considered by the Navy was unreasonable. Plaintiffs Resp. at 10 - 15. Although Plaintiffs suggest that the Navy's treatment of one of the potential sites, Open Grounds Farm, "is worth a closer look," Plaintiffs' Resp. at 11, as discussed below, the record shows the Navy properly considered the Open Grounds Farm site, and appropriately rejected it. DEIS p. 2-63; FEIS p. 2-68.

Seeking to find arbitrariness where none exists, Plaintiffs compare the Open Grounds Farm site in Carteret County (near to the BT-11 Bombing Range at Piney Island) with Hyde County (OLF Site D) (close to the Dare County Target Complex), and suggest that it was improper for the Navy to rely on operational constraints to eliminate the Open Grounds Farm site from consideration, when similar constraints did not cause the Navy to eliminate Site D. Plaintiffs' Resp. at 11 - 14. However, Plaintiffs fail to note that Open Grounds Farms distance to the BT-11 Bombing Range was only one of a number of reasons why the Navy eliminated it from further consideration. The Open Grounds Farm site is located within restricted airspace, R-5306A.

This area is currently used for Navy and Marine Corps training. Stratifying airspace (i.e., carving out an altitude block from surface to 2,500 feet) in order to create an FCLP sanctuary would limit target run-in headings, decrease the size of R-5306A, and diminish the value of the training range. In addition to its location within R-5306A, it is extremely close (less than 8 NM) to the Piney Island Target Complex (BT-11). OLF entry and exit points could potentially impinge upon the range's 5-mile safety buffer zone and was considered a significant operational concern. This location would create an unacceptable safety risk for both FCLP and target operations. For this reason, this site was eliminated from further consideration.

DEIS p. 2-63. In contrast, the Hyde County site is not located in restricted airspace.³ FEIS p. 12-

³ The Hyde County site does have restricted airspace nearby, which would have to be circumnavigated. AR 050509; FEIS p. 12-27.

27. Therefore, the operational issues associated with the Hyde County site are not as significant as with the Open Grounds Farm site.

The Navy's reasons for eliminating the Open Grounds Farm site are clearly articulated in the AR; it was eliminated for those reasons, and not because of some pre-ordained decision to "site as many Super Hornets as possible at Oceana," as Plaintiffs suggest.⁴ Plaintiffs' Resp. at 12. *See* DEIS p. 2-63; FEIS p. 2-68; OLF Siting Study p. 5-16. Simply put, because Hyde County presented fewer operational conflicts than the Open Grounds Farm site, Hyde County remained a viable alternative in the EIS process, while the Open Grounds Farm site did not.

The Navy's selection of Washington County as the OLF site was not due to "reverse engineering," as Plaintiffs continue to assert. The AR establishes that in July 2002, the Navy published the DEIS, identifying Washington County as one of two preferred OLF locations. DEIS p. 2-66. On September 18, 2002, Commander David Sienicki sent an e-mail to his fellow Tiger Team members proposing a September 23, 2002 meeting to discuss the comments and concerns that surfaced from the public hearings on the DEIS. One such issue specifically listed in the e-mail was "VA OLF LOCATIONS." AR 108993. The next day, on September 19, 2002, Commander Kirk Foster (of the Navy's Office of Legislative Affairs) sent an e-mail to Dan Cecchini, the EIS Project Manager, about a congressional inquiry regarding which locations in Virginia had been considered for an OLF before the Navy issued the DEIS. Commander Foster's e-mail specifically asked, "Was Wallops Island ever considered? How about Fort AP Hill or FT Pickett? If not, why not." AR 108042. This inquiry echoed questions raised during public hearings on the DEIS. *See* AR 108993; FEIS p. A-74.

On September 24, 2002, Commander Sienicki sent another e-mail to Tiger Team members publishing minutes from the September 23, 2002 Tiger Team meeting (proposed in AR 108993). Summarizing one of the issues discussed, the minutes stated:

⁴ The Navy had two preferred alternatives, an 8/2 and a 6/4 split, (DEIS ES-2; pp. 2-64 to 2-66; FEIS ES-2, pp. 2-71 to 2-73), however, the United States inadvertently only mentioned the 8/2 split in its Mtn. for S.J.

A discussion ensued as to a recent congressional inquiry as to the Navy's rationale for not reviewing a number of OLF locations in VA including Fort AP Hill, Fort Pickett and Wallops Island. It was concluded that these sites are outside of the 50nm operational criteria...The OLF sites that are located outside of 50nm but between MCAS Cherry Point and NAS Oceana will be considered only for the split siting alternatives. If all 10 squadrons are based at NAS Oceana, only one OLF location is available for selection at Perquimans County, NC. OPNAV will craft the response to the congressional inquiry. DASN(I&F) will ensure that current direction is consistent with Secretariat concurrence. AR 108991 to 108992.

Two days later, on September 26, 2002, Commander Sienicki proposed a draft answer to the question regarding the use of alternative Virginia OLF sites. The file name attached to his e-mail was << File: OLF question.doc >> (AR 109277), and was sent to the other Tiger Team members for comment. AR 108990.

A reading of the entire e-mail string makes it very clear that the comments between Alan Zusman and Commander Robusto, in particular, including Commander Robusto's use of the term "reverse engineer," concerned the prospect of changing the OLF siting criteria in order to respond to this congressional inquiry and comments received at the public hearings on the DEIS. As the United States pointed out in its Response to Plaintiffs' Motion for Summary Judgment at 27, Commander Robusto's use of the somewhat hyperbolic phrase "reverse engineering" actually reflected his concern for the integrity of the Navy's NEPA process. That concern was vindicated by the Navy's ultimate decision NOT to "reverse engineer," *i.e.*, not make any changes in the OLF siting criteria in order to include the Virginia locations cited in the congressional inquiry. Ironically, and directly contrary to Plaintiffs' groundless assertion, this discussion and the ultimate decision related to it demonstrated the integrity of the Navy's process for selecting an OLF site and the Navy's avoidance of "reverse engineering."

Placed in its proper context, both chronologically and substantively, the use of the phrase "reverse engineer," *three months after the Navy publicly identified Washington County as one of two preferred OLF sites*, and in response to a congressional inquiry and comments received at public hearings regarding the Navy's decision not to reconsider certain alternative OLF sites in Virginia, had nothing to do directly with Site C. Rather it referred directly to

possible Virginia OLF sites. Plaintiffs' efforts to suggest otherwise are misleading and wrong.

B. Plaintiffs Have Not Shown that the Navy Failed to Fully Identify and Evaluate the Environmental Impacts of the OLF

In their Response, Plaintiffs assert that the Navy's NEPA analysis is deficient because its evaluation of waterfowl impacts is contradicted by its own studies; because the FEIS allegedly fails to analyze impacts to visitors at the Pocosin Lakes National Wildlife Refuge ("NWR"); and, because the FEIS failed to adequately consider the BASH risk. As we now explain, none of these assertions has merit.

1. The Navy's Discussion and Evaluation of Impacts to Waterfowl is Supported by the Studies Cited

Plaintiffs claim the Navy acted arbitrarily and capriciously in concluding that OLF operations at Site C would have minimal impact upon the wintering waterfowl in the face of its own studies indicating the contrary. Plaintiffs' Resp. at 16. The United States has already fully responded to these arguments. *See* United States' Mtn. for S.J. at 39 - 46 and United States' Response at 34 - 39. Rather than repeat the response here, the United States incorporates them by reference. *Id.* Nonetheless, the United States will briefly reply to Plaintiffs' latest attempt to bolster their position that the *Gunn & Livingston* study establishes that the Navy acted arbitrarily and capriciously.

Initially, Plaintiffs allege that the fact that approximately 86% of operations at the OLF would take place within 1.5 miles of the OLF, several miles from the Pungo Unit of the Pocosin Lakes NWR, is "meaningless" in light of the *Gunn & Livingston* study. Plaintiffs' Resp. at 18. This is simply wrong. As we have previously noted, in the overall context of the Navy's exhaustive analysis, the fact that the Navy did not specifically address all of the findings in that study is not significant and does not detract from the Navy's "hard look" at wildlife impacts. Moreover, the Plaintiffs do not disagree with the substance of the Navy's arguments that, with respect to noise, the sound environment analyzed in the *Gunn & Livingston* study and the sound environment at Site C are very different.

Plaintiffs contend that Navy ignored or misrepresented the findings of studies listed in the FEIS. While that contention is unsupported, it is also not clear how it helps Plaintiffs since none of the studies conclusively correlates flushing episodes from aircraft over flights with significant adverse effects on species population. The Navy's determination that impacts to waterfowl would be "mitigable and minor," even though some flushing would likely take place,⁵ was firmly grounded in literature review and studies, site-specific analyses, discussions with federal and state wildlife regulators, and the judgment of a team of professionals qualified to make predictions of impacts based on best scientific information available. Nonetheless, "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinion of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive." Marsh v. Oregon Natural Resource Council, 490 U.S. 360, 378 (1989). The court's role is not to weigh conflicting expert opinions and the fact that Plaintiffs may simply disagree with the Navy's experts is not a sufficient basis for the Court to conclude that the Navy's action was arbitrary and capricious.

Plaintiffs cite to Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 446 (4th Cir. 1996) ("Hughes River I") for the proposition that an inadequate environmental evaluation violates NEPA. Plaintiffs' Resp. at 25 - 27. Plaintiffs then try to establish a comparison between the FEIS at issue here and the one at issue in that case - - to support an argument that the Navy's reliance upon studies, site visits, and other information, does not rise to the level of a "hard look" at the environmental impacts.

Plaintiffs reliance on Hughes River I is misplaced. Unlike the agency, the U.S. Army Corps of Engineers ("Corps" or "USACE"), in Hughes River I, where expert opinions suggested

^{5/} Plaintiffs' assertions (based on FEIS, p. 12-120) that concentrations of birds under approach paths will be highly variable, Plaintiffs' Resp. at 24, fn. 21, ignores the fact that the Navy also plans to control agricultural practices close to the OLF field in order to discourage birds from foraging close to the field. 68 Fed. Reg. 53,356.

a failure to investigate, here the Navy comprehensively investigated the environmental impacts (as documented in the DEIS), and, after receiving public comments, went the extra mile by contracting for additional study (*e.g.*, additional BASH analysis, limited radar study, and additional research on noise impacts) for the FEIS. While the Navy acknowledges that the exact details of how the Navy will manage and mitigate impacts at Site C cannot be fully determined until OLF site design is completed, necessary permits are obtained, and management plans (such as the BASH Plan and the Integrated Natural Resources Management Plan) are finalized, the Navy clearly compared impacts at the OLF alternative sites and made a reasoned selection of Site C. Additionally, and contrary to Plaintiffs' claims, the Navy does discuss development of mitigation measures (such as restricting crops on less than 5% of available foraging habitat, other land alterations, etc.). 68 Fed. Reg. 53,356, FEIS pp. 12-123, 12-147 to 12-148. In the Record of Decision ("ROD") the Navy stated its intention to mitigate impacts through development of a BASH plan, unlike Hughes River I wherein the Corps did not discuss potential mitigation but instead simply found that the potential for infestations of zebra mussels did not warrant a denial of the permit. Far from "paltry," as Plaintiffs allege in their Response at 25, the Navy's assessment of potential impact on migratory waterfowl was thorough.

Plaintiffs also state that the Navy failed to comply with Section 1502.22(b) of the Council on Environmental Quality ("CEQ") regulations by not preparing an evaluation of long-term impact of aircraft noise on snow geese or tundra swans based upon "theoretical approaches... generally accepted in the scientific community." Plaintiffs' Resp. at 28, *citing* 40 C.F.R. § 1502.22(b)(4). However, this provision is not triggered unless there are "reasonably foreseeable significant adverse effects." *Id.* Given the totality of the Navy's analysis, the Plaintiffs have failed to provide any credible scientific evidence to show that the Navy's conclusion that there was no reasonably foreseeable significant adverse impact upon waterfowl here is arbitrary or capricious.

2. The Navy Adequately Analyzed the Potential Impacts to Visitor Experience at the Pocosin Lakes NWR

Plaintiffs allege that “nowhere in the FEIS does the Navy actually *analyze* expected noise impacts upon the visitor experience at the Pocosin Lakes NWR and surrounding areas using a noise metric other than DNL.” Plaintiffs’ Resp. at 33.⁶ The Navy used the DNL (Day-Night Average Sound Level) noise metric throughout the EIS to determine land use compatibility, including the visitor experience at the NWR, as it has ‘been determined to be a reliable measure of community annoyance for aircraft noise and has become the standard metric used in the United States for aircraft noise.’ FEIS p. 12-29. The Navy conducted site-specific noise analyses at representative locations in the vicinity of proposed OLF locations. FEIS Table 12-4 at p. 12-47. With respect to Site C, one of these locations included Pocosin Lakes NWR. The results of the Navy’s modeling indicated that only a minor increase in noise levels would occur at Pocosin Lakes NWR, with no resultant significant impact to visitor experience expected. FEIS p. 12-122.⁷

Finally, the Summary in the ROD clarifies the reason for the lack of any further detailed analysis concerning this issue. 68 Fed. Reg. 53,357. In these circumstances, the Navy has taken more than a “hard look” at impacts to the visitor experience at Pocosin Lakes NWR.

⁶ In Plaintiffs’ challenge to Navy’s use of DNL, they cite to Fund for Animals, 294 F. Supp. 2d 92 (D.D.C. 2003), suggesting that experts’ opinions should not be excluded without a cogent explanation. Not only is this argument misplaced because the Navy used SEL (Sound Exposure Level) as well as DNL noise metrics, as discussed *infra*, contrary to Plaintiffs’ assertions on p. 33 of their Response, but Fund for Animals also goes on to clarify that “[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.” Fund for Animals, 294 F. Supp. 2d at 110.

⁷ The site-specific noise analysis includes the DNL for each of the representative locations, FEIS Table 12-4 at p. 12-47, and the five aircraft events and corresponding SELs that contribute the most to the DNL at that location. Noise Study, p. F-190 to F-191. The SEL is a measure of an individual’s noise experience at a particular location in that it represents the total sound energy associated with a single aircraft event. FEIS p. 12-46. However, the time-averaging metric, DNL, takes into account both the noise levels of all individual events that occur [at that location] and the number of times those events occur. FEIS p. B-8.

3. The Navy Adequately Considered the BASH Risk

The United States has previously explained the extensive efforts it undertook to consider the BASH risk. United States' Mtn. for S.J. at 39 - 46. The United States will not repeat here the same arguments about the Navy's thorough consideration of BASH issues, but instead incorporates them by reference.

Plaintiffs also suggest that the Navy has minimized the BASH risk with respect to tundra swans in particular. Plaintiffs' Resp. at 36. The Navy has never denied that swans (and other birds) present a BASH issue at Site C; to the contrary, the Navy acknowledged the BASH risk, addressed that risk, and recognized that it must develop a comprehensive BASH Plan. FEIS pp. 12-128 to 12-137 and 12-138 to 145; 68 Fed. Reg. 53,356.

C. The Navy Properly Evaluated Wetlands at all the Alternative Sites

Contrary to Plaintiffs' assertions (at page 40 of their Response), the Navy completed a sufficient wetlands analysis during both the preliminary site screening and alternative site evaluation stages of the OLF Siting Study. Indeed, avoidance of *extensive* wetland/open-water complexes was one of seven preliminary site-screening criteria developed to identify potentially suitable OLF sites within a large geographic area encompassing portions of southeast Virginia, northeast North Carolina, southeast South Carolina, and northeast Georgia. FEIS p. 2-64. As stated previously, the Navy's use of NWI mapping to apply this screening criteria was appropriate given the relative accuracy of the mapping in identifying significant wetland and open water complexes covering greater than 100 acres in size, and the size of the area being evaluated as part of the study. *See* United States' Mtn. for S.J. at 46 - 49 and United States' Response at 51 - 52. No extensive wetland/open water complexes are located within 2.5 miles of the Washington County OLF site. *See* FEIS, Figure 11-7 on p. 11-37 and OLF Siting Study, Figures 7-3 on p. 7-5 and Table 4-9 at p. 4-22. The selection of the Washington County OLF site for further analysis was thus completely consistent with the preliminary screening criteria. OLF Siting Study, Table 2-1 at p. 2-2.

During the alternative site evaluation process, the Navy evaluated wetland resources on the sites based on a review of aerial photography, NWI mapping, land use maps, helicopter reconnaissance, windshield surveys, and field visits. OLF Siting Study, p. 6-7, FEIS p. 12-165 and FEIS Appendix H, Part 1 of 3, Tab 2: Federal Agencies, comments USACE-WIL, pp. H 1 837 to H-1-842. This *expanded* wetland evaluation was sufficient for the purpose of comparing the relative extent of wetlands within the roughly 12,000 acres comprising the “core area,” or potential future construction areas (FEIS. p. 12-2), at the six alternative sites. In the FEIS, the Navy recognized that the extent of its analysis would not be sufficient *for future permitting requirements* in an area where there were wetlands. “Additional wetland delineation would be required to determine the type and extent of wetlands at each site.” FEIS p. 12-165. Therefore, the Navy has already indicated that it will complete formal wetland delineations as part of the Section 404 permitting process if wetlands are determined to be present on the selected site.

Plaintiffs nonetheless continue their insistence that the wetlands evaluation completed by the Navy was flawed because the Navy allegedly failed to discover wetlands at the Washington County site and thus must obtain a Section 404 permit from the Corps of Engineers prior to construction. That is not true. Simply put, there is no requirement to obtain a wetlands permit for the construction of an OLF at the Washington County site because it is agricultural land and the Navy does not believe there are any wetland areas within the potential construction footprint at Site C. (FEIS p. 11-42 and p. 12-166). It is true that the Navy would require a Corps’ permit under Section 404 of the Clean Water Act in order to place culverts in drainage ditches -- not because they are “wetlands,” but because water flowing through the drainage ditches will most likely be considered other “waters of the United States.”⁸ 33 C.F.R. 328.3(a)(8). Contrary to Plaintiffs’ repeated assertions and misunderstanding of Section 404 of the Clean Water Act, the

^{8/} The Navy states in the general section FEIS 12-164 in its introduction to wetlands for all sites that “[i]f based on the final design of the OLF, some wetlands areas would be impacted, the Navy will coordinate with the USACE to obtain the necessary permits and approvals.”

Navy believes no wetlands permit is needed to construct the OLF at Site C, and the Navy properly evaluated wetlands at all the alternative sites.

D. The Navy Took the Required “Hard Look” at the Cumulative Impacts

In their Response, Plaintiffs imply that the Navy should have prepared one EIS addressing the development of an OLF (and presumably the home basing proposal) and the proposed Military Operations Areas (“MOAs”), because the actions are “similar.” Plaintiffs’ Resp. at 42. However, under CEQ Regulations, actions are “similar” if, “when viewed with other proposed agency actions, [they] have similarities that provide a basis for evaluating their environmental consequences together.” 40 C.F.R. 1508.25(a)(3). Contrary to Plaintiffs’ assertion that the development of the OLF and the MOAs are “similar actions” because of “common timing or geography,” Plaintiffs’ Resp. at 42, the OLF and the MOAs are not only functionally independent but serve different purposes and are not “similar actions.” The OLF would be used for FCLPs, a training requirement that does not involve air to air combat maneuvering or use of bombing ranges and therefore does not require special use airspace. FEIS, Appendix H, Part 1 of 3, Tab 4: State Agencies, comments NC-DOA, p. H-1-937. Accordingly, the OLF and the MOAs are not “similar actions” and certainly do not require analysis in one EIS.⁹ Therefore, the Navy is not obligated by law or regulation to analyze the construction of the OLF and the establishment of the U.S. Marine Corps’ proposed MOAs in one document in order to comply with the procedural requirements of NEPA.

Although the Navy was not required to consider both proposals in one EIS, the Navy did consider in its FEIS the cumulative impacts associated with the construction and operation of the OLF with both the proposed Mattamuskeet MOA, and the use of existing Military Training

^{9/} CEQ Regulations do not require an agency to analyze “similar actions” in one impact statement but states that an agency, “may wish to analyze these actions in the same impact statement...[I]t should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement. 40 C.F.R. 1508.25(a)(3).

Areas by the Super Hornets. FEIS pp. 13-14 and 13-15. The United States already addressed Plaintiffs' claim that the Navy failed to consider the cumulative impacts of the Washington County OLF site with the Mattamuskeet MOA. United States' Response at 44 - 45. With respect to the Plaintiffs' assertion that the projected eastern holding pattern is situated over land that is also underneath the proposed MOA, the Navy has indicated that the location of that projected holding pattern will be moved. *See* Declaration of Rear Admiral Turcotte, Exhibit 7 to the United States' Opp. to P.I., para.12; United States' Response at 45. The United States has also previously addressed the issue of cumulative impacts associated with the use of existing military training areas in Eastern North Carolina by Super Hornets. *See* United States' Response at 46 - 47.

Plaintiffs' assertion that the Navy failed to take a hard look at cumulative impacts is simply wrong.

E. The Navy Provided Adequate Mitigation Measures in Connection with the Development and Operation of the OLF

Plaintiffs continue to argue that the Navy failed to provide adequate mitigation measures by not preparing a full BASH plan and Integrated Natural Resources Management Plan, and therefore, violated NEPA's "hard look" requirement. But the law does not require a fully developed mitigation plan during the NEPA process, as the Plaintiffs acknowledge. Plaintiffs' Resp. at 44. As the Supreme Court stated in Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 - 53 (1989), "[I]t would be inconsistent with NEPA's reliance on procedural mechanisms--as opposed to substantive, result-based standards--to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act."

Instead, the Plaintiffs complain that the Navy did not provide enough detail about what mitigation measures might be employed, without ever specifying what (in their view) is enough detail. In any event, the Navy did provide adequate details about possible mitigation measures to comply with NEPA. *See, e.g.*, FEIS at 12-147 to 12-148 (identifying a variety of measures that

might be implemented at the OLF site to reduce the overall BASH risk). In addition, the Navy has stated that it intends to develop a BASH Plan as part of its implementation of the ROD.¹⁰ *See* 68 Fed. Reg. 53,356; *See also* United States' Response at 51. It had been precluded from doing so by the very preliminary injunctive relief obtained by the Plaintiffs in this case. Plaintiffs cannot have it both ways: by arguing for a preliminary injunction, Plaintiffs essentially blocked the Navy's efforts in developing the so-called "adequate mitigation measures" that they are now claiming the Navy failed to achieve during the NEPA process.

The Navy fully complied with the law with respect to its mitigation measures.

F. A Supplemental Environmental Impact Statement ("SEIS") is Not Warranted

Plaintiffs continue to claim that the introduction of "surge" and the "Fleet Response Plan" ("FRP") constitutes a "significant new circumstance" under NEPA and therefore requires the Navy to conduct a SEIS. Plaintiffs' Resp. at 45 - 46. This, too, is unpersuasive. The Navy's projection that the concept of "surge," as implemented through the FRP, would not cause additional environmental impact with respect to the proposed action was fully analyzed in the FEIS. The FEIS noted that a period of surge would potentially increase operational tempo temporarily, but then would be followed immediately by a corresponding decrease in operations, FEIS p. 2-45, and that overall, "there will be minimal change to the total number of flight operations at the homebase and supporting OLFs." FEIS p. 2-44. *See also* Declaration of Rear Admiral James M. Zortman, Exhibit 5 to United States' Opp. to P.I., para. 23.

G. Plaintiffs Have Not Shown that the Navy Failed to Comply with the CZMA

Plaintiffs continue to express a basic misunderstanding of the United States' responsibilities under the CZMA. Plaintiffs again state that they are entitled to summary judgment on their CZMA claims simply because "the Navy admits it never made a consistency

^{10/} In light of the Fourth Circuit's Order on January 3, 2005, granting the United States' motion to stay the preliminary injunction previously granted by this Court pending appeal, the Navy intends to resume work on its BASH Plan as soon as possible.

determination with respect to Beaufort [County].” Plaintiffs’ Resp. at 48. The County Plaintiffs simply may not stand in the shoes of the State and now contest the consistency determination filed by the Navy and approved by the State of North Carolina. By trying to interject themselves into the CZMA federal-state process, County Plaintiffs are impermissibly seeking to exercise authority reserved by the CZMA to the proper state agency, the Division of Coastal Management. By submitting a consistency determination to the State and receiving the State’s concurrence, the Navy has fully complied with the procedural and substantive requirements of the CZMA, NOAA’s regulations, and North Carolina’s federally-approved Coastal Management Plan.

Plaintiffs also express “confusion” over the United States’ position that City of Sausalito v. O’Neill, 386 F.3d 1186 (9th Cir. 2004) does not control the issue of whether the County Plaintiffs have CZMA standing, whereas the United States previously cited the district court opinion in Sausalito, City of Sausalito v. O’Neill, 211 F. Supp.2d 1175 (N.D. Cal. 2002), in support of its Motion to Dismiss this claim. See United States’ Motion to Dismiss filed March 5, 2004, which is still pending. There is nothing confusing about this. The United States believed the district court opinion was correct (and never argued that this district court decision from another circuit was “controlling”), but believes the appeals court decision is incorrect. The United States has petitioned the Ninth Circuit for rehearing, arguing that the Ninth Circuit erred by failing to find that California’s state agency subsumed the interests of individual coastal communities, and by finding that California cities, counties, and other governmental entities subordinate to the state agency had standing to raise CZMA claims.

H. A Permanent Injunction Should Not Be Entered¹¹

The United States has already demonstrated that it should succeed on the merits and that the balance of harms tips sharply in its favor. Contrary to Plaintiffs’ suggestion, a delay in the

¹¹ Despite their request that the Court enjoin all actions to implement the ROD, not simply those related to the OLF (Plaintiffs’ Motion for Summary Judgment at 70), Plaintiffs have now made clear that in fact they do not seek to enjoin the Navy from continuing “to implement its preferred homebasing alternative.” Plaintiffs’ Resp. at 49.

construction and ultimate operation of the OLF is not simply “an inconvenience to the Navy.” Plaintiffs’ Resp. at 51. Rather, as demonstrated by the declarations of several senior Navy officers, including Admiral Fallon, Commander, U.S. Fleet Forces Command, an injunction that prevents the Navy from proceeding with plans for the OLF will cause significant harm to the United States. *See* Fallon Declaration, Exhibit 1 to United States’ Motion for Reconsideration. This significant harm greatly outweighs any need for a permanent injunction, especially when there is absolutely no immediate or imminent harm to the Plaintiffs.

Further, the public interest disfavors permanent injunction relief. In opposing injunctive relief, the United States is not “dismissing” the “public interest of the Counties and their citizens,” Plaintiffs’ Resp. at 54; rather, the Navy is acting to ensure that the public interest served by national defense and military preparedness is protected. The relief that Plaintiffs seek would cause a significant delay that would have a real impact on the public interest in the form of specific national security concerns and deal a significant blow to our military preparedness in the form of the ability to train our pilots.


III. Conclusion

The AR depicts a thirty-nine month progression of a carefully studied and analyzed fact-finding and deliberative process that ultimately allowed the Assistant Secretary of the Navy to make a well-informed decision considering the environmental consequences of all reasonable OLF siting alternatives. As explained in the United States’ Mtn. for S.J., and this Reply, the Navy took the requisite “hard look” at the environmental consequences involved in its decision, complied with all of the procedural requirements of NEPA, and acted in full accordance with the law.

WHEREFORE, for the foregoing reasons, as well as those discussed in the United States’ Motion for Summary Judgment and its Response to Plaintiffs’ Motion for Summary Judgement, the United States should be granted summary judgment as to all claims and the complaints should be dismissed.

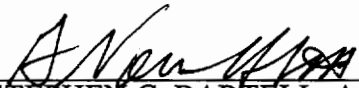
Respectfully submitted this 10th day of January, 2005.

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CERTIFICATE OF SERVICE

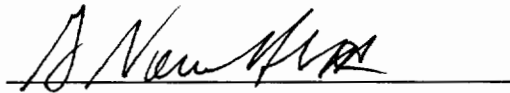
I hereby declare under penalty of perjury, that on the 10th day of January, 2005, I served a true and correct copy of the "United States' Reply in Support of the United States' Motion for Summary Judgment" by Federal Express to the following:

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A handwritten signature in black ink, appearing to read "J. New Mehta", is written over a horizontal line.